United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

against

STUART STEINBERG,

Defendant-Appellant.

Appeal from a Judgment of the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT

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BRIEF FOR DEFENDANT-APPELLANT

Questions Presented

1. Where Steinberg's principal defense was a lack of requisite specific intent due to drug intoxication and he neither argued nor introduced evidence of insanity, as did his co-defendant Howard Kaye, did the trial court commit reversible error in its charge by confusing Steinberg's drug intoxication defense with Kaye's insanity defense in that the court instructed the jury that Steinberg's defense was insanity and that the same legal standards applied to both defenses?

2. Was the trial court's charge on Steinberg's defense theory of entrapment erroneous in that it refused to instruct the jury that drug intoxication was relevant in determining whether Steinberg was induced to commit the crimes charged?

3. Does the government's bare assertion in its original and renewal wiretap applications that "normal investigative procedures" were tried and otherwise appeared futile satisfy Title III's explicit requirement of a factual showing that such procedures short of wiretapping were "unlikely to succeed if tried?"

4. Does the government's failure in its wiretap applications to specifically request that the authority to eavesdrop not "automatically terminate" upon the first interception of the type of communication sought require the suppression of the wiretap evidence and its fruits?

5. Did the government's 24-hour-a-day, 30-day wiretap amount to a roving search in violation of the Fourth Amendment?

6. Does the facilitation of a "conspiracy" violate Title 21 U.S.C. §843(b) which proscribes, *inter alia*, the use of a telephone to facilitate the commission of "any act or acts" constituting a Title 21 felony?

Statement Pursuant to Rule 28(3), Federal Rules of Appellate Procedure

This is an appeal from a judgment of the United States District Court for the Southern District of New York (Ward, J.) rendered on April 8, 1975, convicting appellant, Stuart Steinberg, of conspiracy (Title 21, United States Code, Section 846); three counts of distribution and

possession with intent to distribute a controlled substance (Title 21, United States Code, Section 841 [a][1]); and seven counts of using the telephone in facilitating the commission of the conspiracy (Title 21, United States Code, Section 843[b]).

Prior to trial, Steinberg moved to suppress all evidence derived from wiretap surveillance of his telephones, to dismiss the indictment insofar as based on that evidence, or in the alternative, for a hearing. This motion was denied (see opinion of Ward, J., dated December 27, 1974, JA 53-56).*

Additionally, Steinberg moved in advance of trial to dismiss Count 1 as duplicitous and Counts 7 through 12 and 14 as failing to state an offense. These motions were also denied.

Steinberg and three others were tried before the Honorable Robert J. Ward and a jury on charges of conspiracy (Count 1), distribution and possession with intent to distribute a controlled substance (Counts 2, 3, and 4), and use of the telephone in facilitating the commission of the conspiracy (Counts 7, 8, 9, 10, 11, 12, and 14). On January 29, 1975, Steinberg was found guilty on all counts.

On April 8, 1975, Steinberg was sentenced on Count 1 to an 18-month term of imprisonment (to be followed by a special parole period of three years) and a fine of $10,000. On each of Counts 2, 3, 4, 7, 8, 9, 10, 11, 12, and

* References in parentheses preceded by "JA" are to pages of the joint appendix of appellants Steinberg and Kaye. References in parentheses preceded by "tr." are to the transcript of trial on file with this Court.

14 Steinberg was sentenced to an 18-month term of imprisonment to run concurrently with the sentence imposed on Count 1 (sentencing minutes, at 13). It was further ordered that Steinberg shall become eligible for parole at a time to be determined by the Board of Parole pursuant to 18 U.S.C. §4208(a)(2) (*ibid.*).

A Notice of Appeal from the judgment of conviction was timely served and filed on April 8, 1975.

Execution of Steinberg's sentence has been stayed pending appeal (sentencing minutes, at 17).

Statement

Stuart Steinberg is a young man of previously unblemished record. He is a person nonetheless who has been plagued by a variety of emotional and personal problems, symptomatic of which was the heavy and incapacitating use of phencyclidine ("PCP"), marijuana, and a variety of barbiturates during the summer of 1973 and for some time prior (sentencing minutes, at 3-7).

1. The Prosecution Case

Sometime in early summer, 1973, a "friend" of Steinberg's turned government informer, Ricky Citrola, introduced Steinberg to two undercover agents of the Drug Enforcement Administration ("DEA"), Brian Noone and Arthur Anderson (tr. 58, 192). Noone told Steinberg that he "was interested in only purchasing large quantities of PCP" (tr. 60) as the middleman for "Artie" who had "about $300,000 to invest" (tr. 77). Later, when Stein-

berg was introduced to Anderson, that agent told Steinberg that "he had a lot of money to invest and that [he] usually dealt in cocaine" (tr. 194).

Steinberg made three separate sales of relatively small amounts of PCP to the agents (Counts 2, 3, and 4) and at their repeated urgings made numerous frenetic attempts, mainly by telephone, to obtain other drugs for them (Counts 7, 8, 9, 10, 11, 12, and 14) (see *e.g.*, tr. 61; 67; 80; 90; and Government Exhibits 1C1, p. 3; 2C3, p. 1; 2C7, p. 3; 2C10, p. 6; 2D7; 1D7, p. 6; 2D9, p. 1; 2I10, p. 2; 2K1, p. 3).

Shortly after Noone and Anderson met Steinberg, the agents applied for and obtained a 20-day wiretap order for Steinberg's telephones. The eavesdropping order was sought, it is submitted, as the initial step in the government's investigation without any thought of exploring other more traditional investigative techniques (see Point II[A], *infra*). With this wiretap order, and its subsequent 10-day renewal, the agents embarked upon a 24-hour-a-day, 30-day surveillance of Steinberg's telephone calls without meaningful court direction as to when, short of the 30 days, the surveillance should cease (see Point II[B], *infra*).

Aside from the testimony of Noone, Anderson, and a government chemist, the prosecution case was based almost entirely on wiretap evidence.

The wiretaps established that Steinberg made and received numerous telephone calls to and from his alleged co-conspirators, the agents, and others regarding the drugs in the large quantities wanted by the agents. These tape recorded conversations were relied upon by the govern-

ment in seeking to prove the conspiracy (Count 1). The content of the intercepted calls in large part is not relevant to the points briefed on Steinberg's behalf, and accordingly, is discussed in a limited fashion only in connection with those arguments.

2. The Defense Case

Two defendants presented defense cases. Howard Kaye asserted a traditional insanity defense, and in support of it, introduced the testimony of two treating psychiatrists, Drs. Friend and Willis (tr. 489-557). Additionally, Kaye requested and received from the court an instruction to the jury defining the defense of "legal insanity" (JA 117).

Steinberg's defense on the other hand was that due to his heavy and chronic use of drugs he was incapable of forming the "specific intent" required for conviction of the crimes charged and that he was in a drug induced suggestible mental state and easily swayed by the agents to do what they importuned him to do.

Unlike Kaye who relied on the testimony of two treating psychiatrists, Steinberg's defense theory was premised on uncontradicted proof that during the summer of 1973, he used PCP as often as three to five times every day together with an assortment of other hypnotic and barbiturate drugs including quaaludes, seconals, and tuinals. Steinberg also established through the unrefuted testimony of a psychopharmacologist that the drugs he was taking were mind altering substances drastically impairing mental functioning.

Sandra Deiters, a young woman who knew Steinberg for three and a half years and who saw Steinberg on a near daily basis during the summer of 1973, testified as follows (tr. 572-73):

> "Q. And on those occasions that you were with him did you ever observe Mr. Steinberg taking any drugs? A. Yes.
>
> Q. What kind of drugs did you observe him taking? A. Crystal, quaaludes, seconals, tuinals—anything that he could take.
>
> * * *
>
> "Q. On those days that you were with him, with Mr. Steinberg, you saw him taking drugs, will you tell the jury and his Honor about how often in the course of a day when you were with Mr. Steinberg he took those drugs? A. He took the crystal about three or four or five times a day and sometimes he would not only take the crystal but he would take downs with it.
>
> Q. What are downs? A. Quaaludes, seconals and tuinals.
>
> Q. Seconal and tuinals you said? A. Yes."

Miss Deiters' testimony emphasized the persistent use by Steinberg of PCP. Thus, she testified (tr. 573):

> "A. * * * Crystal, always, he was always taking crystal.
>
> Q. By crystal you mean phencyclidine hydrochloride? A. Yes.
>
> Q. That was always? A. Yes.
>
> Q. Then on other occasions he also took quaaludes? A. Yes."

With respect to Steinberg's state of mind, Deiters said that during the summer of 1973, "at times he was totally oblivious" (tr. 574). She recalled (tr. 574):

> "At other times he appeared to be lucid but five minutes later he would not remember what he had said. He had spoken in unbroken sentences, then broken sentences. He was very mixed up; it was the worst summer of his life. I have never seen him more incapacitated with the drugs [than] at that time."

Dr. Solomon Snyder, a physician, psychiatrist, and pharmacologist on the faculty of Johns Hopkins University Medical School, testified as an expert in the field of psychopharmacology, *i.e.*, the branch of medicine dealing with the effects of drugs on the mind (tr. 585-87).* Dr. Snyder described the effects of PCP on the brain (tr. 595-97):

> "However, in humans at an early stage it became clear that it [*i.e.*, PCP] was a psychotomimetic and hallucinogenic** drug.
>
> * * *
>
> "It differs from some of the other psychotomimetic and hallucinogenic drugs especially such as LSD, which you have heard of, in that there is a unique kind of feeling of disassociation, in that the individual feels that it is not himself that is doing the things that he is doing; that it is his body which is not really part of himself, and how he perceives things is greatly changed.

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* Dr. Snyder's qualifying credentials are enumerated in his testimony (tr. 585-592).

** Dr. Snyder's definitions for these technical terms were (tr. 595):

> "Psychotomimetic means a drug that can produce a mental state in which the individual has lost contact with reality so that he is psychotic or crazy, in simple words.
>
> Hallucinogenic means that the drug can cause in its most explicit use, hallucinogenic would mean that the drug makes you see something that is not there; but usually people refer to a drug that can make distortions of what you perceive. That is also considered a hallucinogenic drug."

> In fact, it is an anesthetic even at very low doses at which you couldn't subjectively realize that your mind is being impaired * * *."

Dr. Snyder also stated that PCP is a psychologically habituating drug (tr. 597), which "impair[s] mental functioning" (tr. 602) and which has a "residual effect" when taken "chronically for several days" causing a "mental functioning [which] would not be quite right" (tr. 609).

With respect to users who take PCP as frequently as did Steinberg during the summer of 1973, Snyder testified (tr. 610-611):

> "The individuals who have taken phencyclidine chronically are definitely disturbed at the time. I was going to cite that there is not a great deal of literature on people who have taken phencyclidine as often as and for as prolonged a period as Mr. Arkin has indicated to me was the case with the defendant.
>
> However, for people who have not even taken it for that long, that much for that long a period of time, they are definitely impaired in their ability to function mentally. There is something aberrant about their judgment even at times when they may appear normal."*

Dr. Snyder stated that the effect of PCP on the human mind is to make one very susceptible to outside influence (tr. 596):

> "Because of this kind of mental discoordination an individual will lose his ability to exert appropriate judgment, and, in fact, at times—well, he will lose his

* Snyder also testified that "people when they are under the chronic heavy influence of a drug like phencyclidine can go in and out and can appear lucid when they are not thinking coherently. * * * His judgment is impaired from [sic] when he may be speaking coherently" (tr. 612).

ability to being in control of his own mental processes, so he is losing control of himself.

To the extent that he is still conscious he will tend to be more easily controlled by outside influences, other people than himself, but in higher doses it's actually a hypnotic."

The government was shown to have capitalized on Steinberg's inability "to exert appropriate judgment" and his suggestible mental state. Agents Noone and Anderson conceded that it was *they* who implanted the idea of cocaine in Steinberg's head and that it was *they* who suggested large deals in pound quantities, not Steinberg.

Noone responded on cross-examination as follows:

"Q. He [Steinberg] didn't suggest pound quantities, you did, isn't that true? A. Yes, it is.

Q. In point of fact, you had no knowledge at that time that he had ever dealt or sold quantities of drugs in that amount, isn't that true? Isn't that a fact? A. Yes" (tr. 114).

* * *

"Q. It was Mr. Anderson, also known as Artie, who asked whether or not cocaine could be supplied? A. Yes. * * *

Q. So it was Artie who introduced cocaine into the conversation? A. Well, he introduced it by just saying he was more aware of how those dealings took place.

Q. But up to this point, Mr. Steinberg had never mentioned cocaine to you, had he? A. No, he had not" (tr. 121).

And Agent Anderson made the same admission (tr. 201):

"Q. You mentioned the cocaine? A. That's correct.

Q. Not Mr. Steinberg? A. That's correct."

Moreover, because of the agents' pervasive intrusion into Steinberg's telephone calls, they knew the extent of Steinberg's drug use. Conversations such as the one with Alyce Samet (Defendant's Exhibit A, JA 57-77) graphically revealed the condition of Steinberg's mind to the government. In another conversation the agents overheard their own informer, Ricky Citrola, tantalize Steinberg with PCP and listened to Steinberg beg for it. The strong inference is that Citrola delivered the drug to Steinberg. That conversation was as follows (Defendant's Exhibit B, pp. 2-3, JA 79-80):

"R (Ricky): Well I got somethin' else anyway.
SS (Steinberg): What'd ya got?
R: Well I—I'm gonna s'come in an see ya.
I gotta see ya.
SS: Comin tonight?
R: Yes.
SS: You gotta come tonight.
R: Yes.
SS: I'm dyin' for it. When—when you comin?
R: Uhh-er-er-er.
SS: Ten minutes? Please tell me ten minutes.
R: I can't you know.
SS: C'mon Rick, how long?
R: Maybe an hour and a half.
SS: An hour and a half. I love ya. Just tell me one thing, is it what I think it is?
R: I'll surprise you.
SS: Dy—Is it what I think it is?
R: I'll surprise you.

* * *

"SS: Ricky is it what I think, is it what you—is it what—is it what they came and showed you? Just tell me that.
R: Yeah.
SS: Oh I love you. I love you. OK Rick. I'll see you in an hour and a half."

In a conversation between Agent Noone and informer Citrola who was then at Steinberg's apartment, Noone clearly evinces his own knowledge of Steinberg's frequent drug intoxication (Defendant's Exhibit C, p. 1, JA 81):

> "B (Brian Noone): Ar, that's good. Er, listen, how does er * * * strike you?
> R (Ricky Citrola): (pause) err * * *
> B: He's lucid?
> R: Er?
> B: Is he all together?
> R: Yeah, ah good (inaudible) much so." (See also, tr. 129-130.)

And in summation, the thrust of Steinberg's defense was carefully defined for the jury (tr. 715):

> "* * * the question I present to you is whether [Steinberg] in the summer of 1973 was ill with drugs, * * * whether he in that condition was so suggestible, so seducible, was so enticeable that when Brian Noone [and] Arty [Anderson] entered his life * * * whether he by doing what he did * * * in his state of mind is guilty of the crime[s] charged in this indictment.
> "The question before you is in view of his condition and in view of the agents' conduct, in view of what was put into his head, whether he had the requisite intent."

Yet, the court in its charge to the jury, confused Steinberg's defense with Kaye's and erroneously instructed the jury that the two defendants had the same defense, to wit, insanity (see, Point I[A], *infra*). Additionally, the court refused to instruct the jury on Steinberg's contention that his drug affected state of mind enabled the agents to induce the very conduct the government seeks to punish (see, Point I[B], *infra*).

POINT I

THE TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY ON STEINBERG'S DEFENSE THEORIES.

The court's instructions demeaned, confused, and misrepresented Steinberg's principal defense that he lacked the requisite specific intent to be guilty of the crimes charged by lumping that defense together with defendant Kaye's traditional insanity defense. Moreover, the court failed absolutely to charge on the defense theory that Steinberg's drug affected mental state was a relevant consideration on the issue of entrapment.

Steinberg's sole defense was that his chronic use of phencyclidine hydrochloride ("PCP") during the summer of 1973 so affected his mind that:

A. he was unable to form the requisite "specific intent" necessary for conviction of the crimes charged; and

B. he was easily swayed by the government agents, who knew him to be drug intoxicated, to attempt to procure large quantities of drugs for them, and was induced by the agents to commit the crimes charged without prior disposition to do so.

Steinberg neither argued in summation nor offered proof of insanity as did Kaye; his entire strategy was keyed to the distinctly different defense of drug intoxication.

A. The Court's Instruction Which Labeled and Treated Steinberg's Drug Intoxication Defense the Same as Kaye's Insanity Defense Erroneously Permitted Steinberg's Defense to Be Rejected by the Jury on an Improper Basis.

Kaye's defense case consisted of the testimony of two treating psychiatrists. On summation, Kaye argued that because of his mental "disease," he should not be held criminally responsible (tr. 740). Additionally, Kaye specifically requested that the court charge the jury on the law of insanity (JA 117).

In marked contrast to Kaye's insanity defense, which in effect assumes guilt, Steinberg's defense had nothing to do with "legal insanity." No treating psychiatrist testified in his behalf, no argument was made that he was legally insane, and no request was made of the trial court to instruct the jury on the law of insanity. Steinberg's defense that because of chronic drug intoxication he lacked the "specific intent" required by the statutory definitions of the crimes charged was thus totally distinct in theory and proof from Kaye's defense.

Yet, in that portion of its charge devoted to defenses, the court stated that *Steinberg together with Kaye* had asserted an "insanity" defense. The court instructed the jury that:

> "The defendants Kaye and Steinberg contend that by virtue of mental disease or defect resulting at least in part from their use of drugs, they were not responsible for their conduct at the times and places charged in the indictment. They have offered evidence in support of this contention." (JA 147-148)

The charge continued by defining for the jury the legal standard it was to use in determining the existence of mental disease or defect and the burden of proof on the defense (JA 148-149).*

Defense counsel stated his "very substantial exception" to the court's misapprehension of Steinberg's defense and its "lumping" it together with that of Kaye (JA 881). The court disagreed that its charge put Steinberg's defense "off-center" by linking it with Kaye's (JA 882) and rejected the defense request for a corrective instruction that "Steinberg does not claim he was mentally diseased, but rather that he was in a drug intoxicated state" (JA 170) and to "distinguish us [*i.e.*, Steinberg] from Mr. Kaye absolutely" (JA 171).

The trial court refused to change its instructions because it believed that at worst it gave Steinberg "an extra defense" (JA 169).

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* That part of the charge reads as follows:

> "The burden of proof is upon the Government to prove beyond a reasonable doubt that each defendant was responsible for his conduct during the period covered by the charges in the indictment.
>
> The law defines mental disease as [sic] defect for the purpose of responsibility for criminal conduct as follows:
>
> > 'A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.'
>
> Under that definition, any lack of capacity must be the result of mental disease or defect, including disease or defect induced by the use of drugs and must be substantial.
>
> The lack of capacity may be either to appreciate one's wrongful conduct or to conform such conduct to the requirements of law. The mere fact that a person repeatedly engages in criminal conduct does not in and of itself justify a finding that he or she is not responsible for his conduct."

Far from providing Steinberg with anything "extra" by way of defense, the trial court's confusion of Steinberg's voluntary intoxication defense with Kaye's insanity defense necessarily demeaned Steinberg's defense in the eyes of the jury, and in the circumstances of this case, virtually required the rejection of Steinberg's defense on an improper basis.

The distinction between Steinberg's drug intoxication defense and Kaye's assertion of "legal insanity" is fundamental. The concept of "legal insanity" asserted by Kaye calls for jury resolution of whether Kaye suffered from a "mental disease or defect" such that he lacked "substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law" (*United States* v. *Freeman*, 357 F. 2d 606, 622 [2d Cir. 1966]).

The defense advanced by Steinberg that at the times relevant to the charges he was drug intoxicated, raises the completely different jury issue of whether Steinberg's mental condition due to drug use created a reasonable doubt that he acted with the "specific intent" required by the statutes he is alleged to have violated. (See, *e.g.*, *Tucker* v. *United States*, 151 U.S. 164 [1893]; *Hopt* v. *People*, 104 U.S. 631 [1881]; *United States* v. *Nix*, 501 F. 2d 516 [7th Cir. 1974]; *United States* v. *Brawner*, 471 F. 2d 969, 998 [D.C. Cir. 1972]; *Womack* v. *United States*, 336 F. 2d 9[illegible] [D.C. Cir. 1964]; *Heideman* v. *United States*, 259 F. 2d 943 [D.C. Cir. 1958], *cert. denied*, 359 U.S. 959 [1959]; and see, *United States* v. *Clark*, 498 F. 2d 535, 537 [2d Cir. 1974]).

It is well-established that evidence of a drug induced intoxication may negate prosecution proof of a defendant's "specific intent" even though the defendant was fully aware that his conduct was unlawful and was able to control it. See, *United States* v. *Brawner, supra,* 471 F. 2d 969, 998; *Battalino* v. *People,* 118 Colo. 587, 199 P. 2d 897, 901 (1948).

In *Brawner, supra,* 471 F. 2d 969, the D.C. Circuit carefully distinguished between a traditional insanity defense and a defense theory of an "abnormal mental condition" (drug induced or otherwise) not amounting to the level of an insanity defense but rather going to the statutory mental element of "specific intent." The *Brawner* Court wrote (*id.*, 471 F. 2d, at 1002, n. 75):

> "Assuming the introduction of evidence showing 'abnormal mental condition,' *the judge will consider an appropriate instruction making it clear to the jury that even though defendant did not have an abnormal mental condition that absolves him of criminal responsibility, e.g.,* if he had substantial capacity to appreciate the wrongfulness of his act or to control his behavior *he may have had a condition that negatives the specific mental state required for a * * * crime * * *.*" (Emphasis added.)

In the case at bar the trial court failed to "make it clear to the jury" that Steinberg *did not* claim that he lacked "substantial capacity to appreciate the wrongfulness of his act or to control his behavior," but that nonetheless, his use of drugs may have created "a condition that negatives the specific mental state required for a crime."

For Steinberg to have prevailed on his defense of drug intoxication, contrary to the court's charge, the jury need

not—and certainly should not—have even considered whether Steinberg suffered from a "mental disease or defect." But the fair import of the court's charge taken as a whole was that Steinberg's defense—which was mistakenly characterized by the court as a "mental disease or defect resulting at least in part from [his] use of drugs"—should be rejected unless the jury was persuaded by the evidence that his drug intoxication did amount to a "mental disease or defect."

Since Steinberg produced no treating psychiatrist,* offered no evidence of "mental disease or defect," and made no argument at all of that tenor, the jury's rejection of the defense Steinberg did offer—a lack of "specific intent"—may well have been based on Steinberg's failure to show a "mental disease or defect." Under the court's instructions, the jury was justified in believing that drug intoxication is no defense unless it amounts to "legal insanity."

The identical confusion of defenses was cause for reversal in *State* v. *Smith*, 260 Or. 349, 490 P. 2d 1262 (1971). In that case the defense theory was that the defendant had taken LSD shortly before the alleged burglary and was under its influence at the time, unable to form the specific intent required for a conviction of that crime. The trial court incorrectly charged the jury as follows (*id.*, 490 P. 2d, at 1263):

> "To be available as a defense a voluntary state of being drugged or being intoxicated or both, must

* Here again the trial court misstated the case to the jury by informing it (JA 148-149):

> "You will recall that the defendants Kaye and Steinberg called three doctors who have specialties in psychiatry."

Steinberg's expert, although a psychiatrist, was called as an expert in the field of psychopharmacology—the effects of drugs on the brain.

result in a diseased mind or some other form of insanity."

On appeal, the Oregon Supreme Court reversed Smith's conviction because the trial court confused Smith's drug intoxication defense with an insanity defense, and wrote (*id.*, 490 P. 2d, at 1264):

> "The intoxication need not produce a 'diseased mind' nor insanity in order to be considered in deciding whether the defendant possessed the requisite intent.
>
> * * *
>
> "The defendant here made no contention he was insane and 'insanity' is not involved.
>
> "In stating that the intoxication must result in a diseased mind or some other form of insanity in order to be considered as a defense, the instruction is in error."

As in *Smith*, the charge at bar left the jury with the erroneous impression that "intoxication must result in a diseased mind or some other form of insanity in order to be considered as a defense."

What charge the trial court did give on drug intoxication (Steinberg's Request to Charge No. 14[a], JA 115) was given only as an aspect of its general definition of criminal intent; nowhere was drug intoxication labeled by the court as a defense for *Steinberg*. It was not until the court gave its charge on insanity confusing Steinberg's defense with Kaye's that the label Steinberg's defense was attached (JA 147-148).

In the circumstances, the granting of Steinberg's Request to Charge No. 14(a) cannot be said to mitigate the error.

As the Supreme Court wrote in *Mills* v. *United States*, 164 U.S. 644 (1897):

> "which of the two statements was received and acted upon by the jury it is wholly impossible for this court to determine; and, as one of them was erroneous * * * the judgment * * * must be reversed * * *."

See also, *Nicola* v. *United States*, 72 F. 2d 780, 787 (3d Cir. 1934); *Frank* v. *United States*, 220 F. 2d 559, 565 (10th Cir. 1955); *Smith* v. *United States*, 230 F. 2d 935, 939 (6th Cir. 1956); and compare, *United States* v. *Reid*, —— F. 2d —— (2d Cir. 1975), slip op. 3073, 3095-96; *United States* v. *Jacobs*, 475 F. 2d 270, 283-84 (2d Cir. 1973), *cert. denied sub nom. Lavelle* v. *United States*, 414 U.S. 821 (1973).

It follows that the erroneous and prejudicial charge linking Steinberg to Kaye's insanity defense constitutes reversible error and requires that a new trial be granted.

B. The Trial Court's Failure to Instruct the Jury on Drug Intoxication as an Aspect of the Defense of Entrapment Deprived Steinberg of Jury Consideration of One of His Defense Theories.

In addition to Steinberg's defense that drug intoxication prevented him from forming the "specific intent" required for conviction of the crimes charged, Steinberg also asserted that because of the peculiar nature of his drug intoxicated state he was suggestible and easily swayed by the DEA agents to commit acts they actively and repeatedly sought him to commit.

Thus, Steinberg requested that the court instruct the jury on state of mind due to drug intoxication in relation

to his defense of entrapment. Request to Charge No. 39 (b) submitted by Steinberg is as follows (JA 116):

> "You may also consider, on the issue of the degree of Government participation, the condition of Stuart Steinberg's mind—*i.e.*, whether he was more than reasonably susceptible to Government suggestions, or whether he was in a hypnotic state or some other less than normal emotional condition—at the time of his dealings with Agents Noone and Anderson."

The court refused to instruct the jury as requested and an exception was taken (tr. 876).*

It is submitted that the trial court erroneously failed to charge that Steinberg's state of mind as affected by drug intoxication was an element to be considered by the jury in its evaluation of whether Steinberg was *induced* by government agents to commit the crimes charged.

Without question, a defendant's state of mind, his mental condition at the time of the alleged government inducement, is a crucial factor to be considered by the jury on the issue of entrapment. As the Supreme Court wrote in *United States* v. *Russell*, 411 U.S. 423 (1973), "the thrust of the entrapment defense * * * focus[es] on *the intent* or predisposition of the defendant to commit the crime" (*id.*, 411 U.S., at 429). (Emphasis added.)

The *Russell* Court emphasized that the accused's state of mind is an essential question raised by a claim of entrapment and stated (*id.*, 411 U.S., at 436):

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* As requested by the prosecution (JA 118-121), the court did charge the jury on the traditional defense of entrapment in accord with this Court's suggested instruction in *United States* v. *Braver*, 450 F. 799, 805 (2d Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972) (JA 149-152).

> "It is only when the Government * * * actually implants the criminal design *in the mind of the defendant* that the defense of entrapment comes into play." (Emphasis supplied.)

The Fifth Circuit unequivocally ruled in *United States v. Mosley*, 496 F. 2d 1012 (5th Cir. 1974), *aff'd on rehrg.*, 505 F. 2d 1251 (5th Cir. 1974), that a defendant is entitled to proper instructions as to the bearing of his mental state on the question of entrapment. In that case the defendant was charged with distributing and possessing with intent to distribute heroin. His defense was entrapment. The trial court, however, precluded him from adducing on that defense issue, proof of a head injury which resulted in a change in his personality such that he "was more easily swayed by others" (*id.*, 496 F. 2d, at 1017).

The Court reversed Mosley's conviction and wrote (*id.*, 496 F. 2d, at 1017):

> "We cannot say that a head injury, a changed personality, and a resulting tendency to be easily swayed by others are not relevant factors to be considered on the issue of predisposition. * * * *Evidence relevant to appellant's predisposition, one way or the other, should go to the jury for resolution with proper instructions.*" (Emphasis added.)

Similarly, the error here is that the trial court, by its failure to give "proper instructions," foreclosed the jury from resolving Steinberg's defense claim that his drug intoxication made him "easily swayed by" the government's agents—a "relevant factor to be considered * * *" on the defense of entrapment.

At first blush, the *Mosley* decision might appear inconsistent with this Court's ruling in *United States* v. *Henry*, 417 F. 2d 267 (2d Cir. 1969), *cert. denied*, 397 U.S. 953 (1970), that "pharmacological coercion [does not] contradict [propensity]" (*id.*, 417 F. 2d, at 270). Yet, the Court in *Mosley* in discussing what factors—including changed personality—go into the determination of whether a defendant was "swayed" by government agents most certainly was dealing with the issue of *inducement* despite its use of the phrase "predisposition" in the opinion. (Compare, *United States* v. *Russell*, *supra*, 411 U.S. 423, at 429).

But semantics aside, it has long been the law in this Circuit that entrapment as a defense consists of two elements: inducement of the defendant by the government, and lack of propensity by the defendant to commit the act charged. As Judge Learned Hand wrote in the now classic *United States* v. *Sherman*, 200 F. 2d 880, 882 (2d Cir. 1952), "on the first question the accused has the burden; on the second the prosecution has it."

Unlike *United States* v. *Henry*, *supra*, 417 F. 2d 267, where the defense sought to rebut evidence of *propensity* by evidence of pharmacological coercion, to wit, heroin withdrawal symptoms, Steinberg's defense was that his suggestible mental state caused by a pharmacological substance was additional and strong evidence of his *inducement* by the agents and particularly so, since the agents had knowledge of his condition and *even supplied him with the drug* on at least one occasion. Steinberg's burden on the issue of *inducement* would, in part, have been met by evidence of his intoxicated mental state.

Again, the point is that the trial court's failure to charge on the essential factor of Steinberg's mental state may well have prevented the jury from properly determining whether Steinberg met *his* burden of proof on the issue of *inducement*.

The whole focus of Steinberg's entrapment defense was that as a result of his chronic ingestion of PCP and other drugs during the summer of 1973, he was in a hypnotic mental state capable of being easily swayed by the government agents' importunings that he engage in procuring drugs for them.

The agents, well aware of Steinberg's mental condition because of the exhaustive 24-hour-a-day wiretap intrusion into Steinberg's otherwise private telephone conversations, persistently suggested to Steinberg that he obtain drugs for them. Indeed, in one taped conversation, the government informer, Ricky Citrola, who was under orders from Agent Brian Noone to "really get him [Steinberg] going" (Defendant's Exhibit C, p. 11, JA 91) taunts Steinberg with PCP, and the strong inference is that Citrola delivered the drug to him.

To be sure, Steinberg was a drug user. But it was the DEA agents who had no knowledge of prior dealings by Steinberg, if there were any (and there was no such proof), who implanted in Steinberg's mind the idea that he attempt to obtain large quantities of PCP and cocaine. Far from being someone with the capacity to sell large amounts of PCP or any amount of cocaine, the evidence is overwhelming that in response to the solicitations of the government's agents, Steinberg spent nearly two months frantically and

unsuccessfully trying to put deal after deal together for them. As Steinberg told Agent Noone (Government Exhibit 2K1, p. 3):

> "I just want to show you that I'm working for you'n everything's dynamite."

The evidence adduced by Steinberg on his own defense coupled with the cross-examination of prosecution witnesses and the prosecution's tape recordings went far beyond the threshold level of proof required to justify a jury charge on the defense theory of drug intoxication as bearing on entrapment. As this Court wrote in *United States* v. *O'Connor*, 237 F. 2d 466, 474, n. 8 (2d Cir. 1956):

> "A criminal defendant is entitled to have instructions presented *relating to any theory of defense* for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be." (Emphasis supplied.)

See also, *United States* v. *Platt*, 435 F. 2d 789, 792 (2d Cir. 1970).

Steinberg's proof that his drug induced, highly suggestible mental state was seized upon by the drug agents who repeatedly sought to "get him going" was substantial and certainly neither "weak" nor "incredible" and went virtually unchallenged by the prosecution. As to the question of Steinberg's predisposition, if any, there was ample proof for the jury to find a reasonable doubt on that issue.

That Steinberg was a user of PCP and other drugs is not equivalent to proof that he was also a predisposed seller of drugs in the quantities charged in this case. See, *United States* v. *Watson*, 489 F. 2d 504, 507, n. 3 (3d Cir. 1973); *United States* v. *Ewbank*, 483 F. 2d 1149, 1151 (9th

Cir. 1973). Indeed, the evidence is compelling that he did not have the predisposition to sell cocaine or PCP in large quantities. His disorganized, outrageously naive, and unsuccessful efforts to obtain large quantities of the drugs proves that. And, as the agents admitted, it was they and not Steinberg who conceived the idea of dealing in cocaine and in large amounts.

Where, as in the instant case, the defense claim is that the state of the defendant's mind made it easy for the government to implant the criminal design and induce the very conduct charged, and the record is abundant with factual support for that theory, the defense is entitled to an instruction (such as that requested by Steinberg in Request No. 39[b]) informing the jury that the defendant's mental state is a factor to be considered in determining whether the government actually implanted the criminal design in the defendant's mind.

The trial court's denial of Steinberg's Request to Charge No. 39(b) deprived Steinberg of his defense theory and was serious error requiring a reversal of the judgment of conviction.

POINT II

THE GOVERNMENT'S USE OF ELECTRONIC SURVEILLANCE VIOLATED TITLE III AND THE FOURTH AMENDMENT.

Steinberg moved prior to trial for suppression of wiretap evidence obtained pursuant to court orders dated July 20, 1973 and August 20, 1973 (JA 13-17, JA 33-36), and all evidence derived therefrom, upon the grounds, *inter alia*, that:

A. no facts were submitted by the prosecution in support of its wiretap applications to enable the issuing judges to make the required determination that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed or to be too dangerous" (18 U.S.C. §§2518[1][c], [3][c]); and

B. the continuation of the wiretap beyond the first interception of the type of communication sought violated Title III provisions (18 U.S.C. §§2518[1][d], [4][e]) and the Fourth Amendment.

On December 27, 1974, the trial court denied the motion to suppress without a hearing (see opinion of the Honorable Robert J. Ward, JA 53-56).

A. The Original and Renewal Wiretap Orders Were Issued Without Justification in Violation of Title III in that There Was No Factual Showing that Normal Investigative Procedures Had Been Tried and Failed or Were Unlikely to Succeed.

A wiretap order may not be issued without a determination by the court "on the basis of the facts submitted" by the government in a "full and complete statement" that:

> "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous" (18 U.S.C. §§2518[1][c], [3][c]).

The government's July 18, 1973 wiretap application contains no factual support for its sterile recitation tracking statutory language that "normal investigative procedures have been tried and failed to and further normal

procedures reasonably appear to be unlikely to succeed and are too dangerous to be used, if tried" (application of Assistant United States Attorney John P. Cooney, Jr., July 18, 1973, Paragraph 4[c], p. 4, JA 21).

The government claimed in conclusory fashion that "because of the covert manner in which Stuart L. Steinberg operates" there was "no known undercover access to his supplier and no chance of developing such access" (affidavit of Special Agent Brian J. Noone, July 18, 1973, Paragraph 11[A], p. 7, JA 30). Additionally, it was asserted that in the general experience of the Drug Enforcement Administration "individuals dealing in large quantities of narcotics are particularly covert in their activities and wary of surveillance * * * very rarely keep records, deal personally with a few trusted individuals and isolate themselves from other individuals in the distribution organization" (*id.*, Paragraph 11[B], p. 7, JA 30).

The exact same allegations were made by the government in its August 20, 1973 application for an extension of the wiretap authorization (JA 41, JA 50-51).*

No factual basis whatever was provided for the government's assertion that *Steinberg* operated in a "covert manner." Nor was there even a blush of a showing that *Steinberg* was the sort of person to be reasonably included within the government's generalization relating to "individuals dealing in large quantities of narcotics," who are "particularly covert in their activities and wary of surveillance * * *." Moreover, the application makes no factual refer-

* Even the same misspellings were contained in the renewal application (compare Cooney's July 18, 1973 application, p. 4, line 26, JA 21, and Lavin's August 20, 1973 application, p. 5, line 18, JA 42).

ence to a single "normal investigative procedure" which was tried and failed or which the government determined likely to fail if tried or to be too dangerous to use.

It is submitted that the original and renewal wiretap applications were deficient and the issuance of wiretap orders improper because the government's failure to include a "full and complete" factual statement as to whether or not other normal investigative procedures have been "tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," made it impossible for the issuing judges to make that determination (18 U.S.C. §§2518[1][c], [3][c]).

The government's assertion that other investigative procedures had been tried and failed and appeared unlikely to succeed is factually baseless and contradicted by the allegations in the affidavits submitted in support of the applications, as well as the trial testimony of the DEA agents.*

Special Agent Noone alleged in the application that the wiretap was needed because there was "no known undercover access" to Steinberg's supplier and "no chance of developing such access" because of Steinberg's "covert manner." Yet, at the inception of the investigation on June 26, 1973, Noone, in an undercover capacity, was personally introduced to Steinberg (who never used an alias [tr. 118]), in Steinberg's apartment, by two informers of the Drug Enforcement Administration. On that same day Noone

* During the trial and at sentencing, Steinberg's pretrial motions to suppress, or in the alternative for a hearing, were renewed on the basis of the concessions made by government agents in the course of their testimony, and in the presentence report. These motions were also denied.

received from Steinberg a quantity of PCP and Steinberg's listed and unlisted telephone numbers "where he could be contacted for future transactions" (Noone affidavit, July 18, 1973, Paragraph 4, p. 3, JA 26, and see tr. 57, 61, 63, and 108). Noone and one of the informers again went to Steinberg's apartment on the next day where Noone purchased 58 grams of PCP directly from Steinberg (JA 27, tr. 67).

On July 10, 1973, another undercover agent, Special Agent Arthur Anderson, accompanied Noone to Steinberg's apartment where they purchased eight ounces of PCP from Steinberg (JA 28, tr. 80).

Thus, it was compellingly established that the government did indeed have undercover access into Steinberg's "operation" (through two informers and undercover agents Anderson and Noone) and that Steinberg's "manner" in dealing with the government's undercover access was not "covert."

The generalization, repeated verbatim in both the original and renewal application, that "individuals dealing in large quantities of narcotics are particularly covert * * * and wary of surveillance" has no significance at all absent any factual showing that *Steinberg* in particular was covert and wary of surveillance.

As the court wrote in *United States* v. *Staino*, 358 F. Supp. 852 (E.D. Pa. 1973), in analyzing whether resort to wiretapping was justified:

> "Criminal activity, by its very nature, does not follow any universally preordained pattern of operation. And

each particular illegal activity must be judged on its own individual terms." (*Id.*, 358 F. Supp., at 856).

The factual situation in *People* v. *Gastelo*, 67 Cal. 2d 586, 432 P. 2d 706 (1967), is analogous to the case at bar. There, the prosecution sought to justify an unannounced forcible execution of a search warrant against a suspected narcotics violator on the same kind of generality relied upon in the instant case, to wit, that "narcotics violators normally are on the alert to destroy the * * * evidence quickly at the first sign of an officer's presence." (*Id.*, 432 P. 2d, at 708). The Supreme Court of California reversed that defendant's conviction, excluded the seized evidence, and held, *en banc*, that unannounced forcible entries may not be authorized "by a blanket rule based on the type of crime or evidence involved." In language especially relevant here and consistent with the Title III requirement of a "full and complete" statement of facts, Chief Justice Traynor wrote (*id.*, 432 P. 2d, at 708):

> "Since there was nothing in the present case to justify the officers' failure to [announce their entry] except an asserted general propensity of narcotics violators to destroy evidence when confronted by police officers, the officers' entry was unlawful."

The vice in the wiretap application at bar is the same as that condemned in *Gastelo*: a determination that other normal investigative procedures have been tried and failed or appear unlikely to succeed if tried or to be too dangerous may not be made on a "blanket rule based on the type of crime or evidence involved." Aside from the allegation of the general "propensity of" individuals dealing in large quantities of narcotics to be "covert" and "wary of sur-

veillance," no facts whatever were alleged in the application from which a neutral determination could be made that normal investigative procedures were unlikely to succeed *in this case* if tried.

With respect to the government's avowed objective to discover Steinberg's "source of supply," trial testimony and the application itself establish beyond cavil that the government rejected the use of readily available investigative techniques short of wiretapping which were likely to succeed.

On July 10, 1973, Noone was present in Steinberg's apartment and watched Steinberg telephone a "Nicky or Mickey" in response to Noone's suggestion that Steinberg obtain for him larger quantities of PCP (tr. 75). Steinberg then told Noone to return that evening at 10 P.M. for the delivery which Steinberg expected at 9:30 P.M. (tr. 75, 124). The application failed to state whether or not Steinberg's apartment was put under surveillance that night. Nor did the application even state that the agents' belief was that such visual surveillance was "not likely to succeed if tried", if that were the case.

Moreover, at trial the agents made it clear that *they did not want to meet* Steinberg's source. Noone's testimony was (tr. 77):

> "Then Agent Anderson said [to Steinberg on July 10] that he didn't want anybody in the apartment, he just wanted the three of us, he wanted no other people."

Anderson recalled that at the July 10 meeting with Steinberg he "inquired if there was anyone else in the

apartment because [he didn't] like to do business if other people are around * * *'' (tr. 193, 200).

And as Noone confessed in his affidavit submitted in support of the wiretap application, it was *he* who ''did not wish to meet'' the people Steinberg contacted to get PCP (JA 28).

In a July 17 conversation between Noone and Steinberg, one day prior to the date of the wiretap application, a July 26 date was made for delivery of 50 pounds of PCP by Steinberg to the agents at his apartment (tr. 89). On the same day of the government's wiretap application—July 18—Steinberg advanced the July 26 delivery date for part of the 50 pounds to July 25 (tr. 90).* Yet, the government persisted with its wiretap application despite the fact that a standard visual surveillance of Steinberg's apartment certainly should have revealed Steinberg's ''source of supply.'' Again, had such surveillance taken place and not succeeded at least the application should have made this fact known to the issuing judge. Alternatively, an explanation of *why* the agents believed such surveillance was not ''likely to succeed'' *if that were the case* should have been given.

The explicit requirements of Title III of the Omnibus Crime Control Act of 1968, 18 U.S.C. §§2518 (1)(c) and (3)(c) and their legislative history manifest a congressional effort to prevent law enforcement agents from proceeding by way of wiretapping when other conventional means of investigation are available. The Senate Report provides as

* Steinberg's arrangements with the agents in this instance as with virtually all of his others, were pie in the sky.

follows: (S. Rep. No. 1097, 90th Cong., 2d Sess. 101, U.S. Code Cong. and Admin. News 1968, pp. 2112, 2190):

> "The judgment would involve a consideration of all the facts and circumstances. Normal investigative procedure would include, for example, standard visual or aural surveillance techniques by law enforcement officers, general questioning or interrogation under an immunity grant, use of regular search warrants, and the infiltration of conspiratorial groups by undercover agents or informants."

In commenting upon Title III's requirement that the application demonstrate and the authorizing judge find that "normal investigative procedures" have either failed or appear unlikely to succeed, the Supreme Court, in *United States* v. *Kahn*, 415 U.S. 143, 153, n.12 (1974), wrote:

> "This language * * * is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime."

And in *United States* v. *Giordano*, 416 U.S. 505, 515-16 (1974), the Supreme Court wrote:

> "The Act is not as clear in some respects as it might be, but it is at once apparent that it not only limits the crimes for which intercept authority may be obtained but also imposes important preconditions to obtaining any intercept authority at all. Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation."

In language particularly apposite here, the Court continued, *id.*, 416 U.S., at 521:

> "* * * we think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the Congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device."

See also, *United States* v. *Tortorello*, 480 F. 2d 764, 774 (2d Cir. 1973), *cert. denied*, 414 U.S. 866 (1973); *United States* v. *Bobo*, 477 F. 2d 974, 981 (4th Cir. 1973); *United States* v. *Lanza*, 356 F. Supp. 27, 30 (M.D. Fla. 1973).

Here, in violation of the statute's language and intent, wiretapping was resorted to reflexively "as the intial step" despite the availability and practicability of "traditional investigative techniques." Certainly, at least the viability of normal investigative techniques was not negated by anything in the government presentation. Contrariwise, successful undercover access had been established,* there was no suggestion that visual surveillance was likely to be detected or unlikely to succeed,** and no representation that

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* Compare, *United States* v. *James*, 494 F. 2d 1007 (D.C. Cir. 1974), *cert. denied*, —— U.S. —— (1975); *United States* v. *Falcone*, 364 F. Supp. 877 (D.N.J. 1973), *aff'd*, 500 F. 2d 1399, 1401 (3d Cir. 1974); *United States* v. *Focarile*, 340 F. Supp. 1033 (D. Md. 1972), *aff'd, sub nom. United States* v. *Giordano*, 469 F. 2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974).

** Compare, *United States* v. *Bobo, supra*, 477 F. 2d 974; *United States* v. *Falcone, supra; United States* v. *Mainello*, 345 F. Supp. 863 (E.D.N.Y. 1972); *United States* v. *King*, 335 F. Supp. 523 (S.D. Cal. 1971), *modified*, 478 F. 2d 494 (9th Cir. 1973), *cert. denied*, 414 U.S. 846 (1974); *United States* v. *Leta*, 332 F. Supp. 1357 (M.D. Pa. 1971); *United States* v. *Escandar*, 319 F. Supp. 295 (S.D. Fla. 1970), *rev'd on other grnds.*, 468 F. 2d 189 (5th Cir. 1972); *United States* v. *Focarile, supra.*

the known informers were unable or had refused to testify.* In short, the government's resort to wiretapping in the context of the facts and circumstances of this case "where traditional investigative techniques would suffice to expose the crime" was totally unjustified, improper, and based upon an insufficient application.

United States v. *Curreri*, 388 F. Supp. 607 (D. Md. 1974), is directly in point. There, the government sought wiretap authorization to aid its investigation of federal gambling and conspiracy law violations. The application contained the same conclusory allegations as the ones at bar in referring to the futility of other methods of investigation, and was challenged by the defendant on the same ground asserted here. Notably, the government opposed a motion to suppress the fruits of the electronic surveillance by claiming that all reasonable efforts had been made "but had failed to disclose the identities of the other persons participating * * * in the illegal * * * operation" (*id.*, 388 F. Supp., at 618).

The court ordered suppression of the wiretap evidence on the ground that the tap application failed to disclose what normal techniques were utilized and whether certain techniques posited by the court failed or seemed likely to fail if tried. In language especially relevant to this case, the court wrote (*id.*, 388 F. Supp., at 620):

* Compare, *United States* v. *O'Neill*, 497 F.2d 1020 (6th Cir. 1974); *United States* v. *Bobo*, *supra*; *United States* v. *Lanza*, *supra*, 356 F. Supp. 27; *United States* v. *Mainello*, *supra*; *United States* v. *Whitaker*, 343 F. Supp. 358 (E.D. Pa. 1972), *rev'd on other grnds.*, 474 F. 2d 1246 (3d Cir. 1973), *cert. denied*, 412 U.S. 953 (1973); *United States* v. *Leta*, *supra*; *United States* v. *Escandar*, *supra*; *United States* v. *Askins*, 351 F. Supp. 408 (D. Md. 1972).

> "While there may have been eminently sound reasons why these investigative techniques were not considered to be likely to succeed, if tried, *those reasons were not made known to* [*the issuing judge*] *in the application, nor was* [*he*] *told in the application that those techniques had been tried but had proved unsuccessful.*" (Emphasis added.)

As in *Curreri*, the application in the case at bar utterly failed to set forth any investigative technique utilized unsuccessfully by the agents and made no attempt at even suggesting *factual* reasons why techniques other than electronic surveillance would fail if tried.

It follows that the authorization to conduct wiretapping was improperly issued, and that the intercepted communications and derivative evidence should have been suppressed.

B. The Government's 24-Hour-a-Day, 30-Day Wiretap Violated the Fourth Amendment and Title III.

Unless the government makes a particular showing to the issuing judge justifying continuous electronic surveillance, all wiretapping permitted by a Title III order *must* "automatically terminate upon interception of the first sought communication" (18 U.S.C. §2518[1][d], §2518[4][e]). In the case at bar, no particularized showing was made to warrant the continuation of the tap beyond the first interception, and yet, surveillance continued for a total of 30 days.

On July 20, 1973, the government sought permission to intercept telephone calls made to and from Steinberg's

telephones until its objectives were achieved* or for a period of 20 days, whichever occurred earlier.

The July 18, 1973 application contained no request that the authorization for interception should not automatically terminate upon first intercepting the type of communication described,** nor did the application contain a particular description of facts establishing probable cause to believe that additional communications of the type described would occur thereafter. Nonetheless, the July 20, 1973 wiretap order (JA 15-16) granted permission to the government to wiretap beyond the first interception of the type of communication described and until *the government's objectives were achieved* or until 20 days elapsed, whichever occurred earlier.

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* The government stated its objectives as follows (JA 22):

> "[To intercept communications] which reveal the details of the scheme which has been used by Stuart L. Steinberg and others with intent to distribute and otherwise illegally deal in narcotics and dangerous drugs, and the identity of their confederates, their places or [sic] operation and the nature of the conspiracy involved therein * * *."

** Mr. Cooney's July 18, 1973 application (JA 20-21) described the type of communication sought as "communications * * * between Stuart L. Steinberg, his suppliers or customers and others as yet unknown concerning:

(1) the date, time, place and manner in which controlled substances in Schedule III will be illegally delivered to or by Stuart L. Steinberg.

(2) The price Stuart L. Steinberg is to pay or receive for the controlled substances and the date, time, place and manner of payment for the drugs; and

(3) The nature and extent of the distribution system in which Stuart L. Steinberg and others as yet unknown are involved, the (identification of and) degree of involvement of these persons whose relationship to Stuart L. Steinberg is not fully known, and the identification and degree of involvement of others as yet unknown."

The August 20, 1973 renewal application (JA 43) requested permission to continue the wiretap surveillance for a maximum 10-day period or until the identical government objectives were achieved. Again, no request that the extended wiretap authorization not automatically terminate upon first intercepting the type of communication described was contained in the application, nor was there any showing of probable cause that additional communications of that type would occur after the first.

The August 20, 1973 renewal order (JA 33-36) contained no termination statement at all—not even the meaningless limitation of the July 20 order that interception cease when the government achieved its objectives. Rather, the order authorized blanket wiretap surveillance for a 10-day period (JA 36).

Since the original and renewal wiretap applications failed to specifically request that the authorization to intercept not "automatically terminate" upon the first interception of a communication of the type described and failed to include a description of facts establishing probable cause to believe that more than one communication of the type described would occur, Title III (18 U.S.C. §2518[1][d]) was violated as were Steinberg's Fourth Amendment rights.

1. The Original and Renewal Applications Failed to Conform with Title III Requirements.

To meet the constitutional requirement that electronic surveillance not amount to a "roving commission" the "equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause" con-

demned in *Berger* v. *New York*, 388 U.S. 41, 59 (1967), Title III legislation requires the *automatic* termination of wiretap authority upon interception of the first sought communication (18 U.S.C. §2518[4][e]). Provision is made, however, for an additional period of surveillance in a particular case upon specific application by the government that the surveillance not automatically terminate upon interception of the first sought communication (18 U.S.C. §2518[1][d]). Such an extended period of surveillance may only be authorized when the government provides "a particular description of facts establishing probable cause to believe that additional communications of the same type will occur" following the interception of the first sought communication (18 U.S.C. §2518[1][d]).

As stated in the Senate Report on Title III (S. Rep. No. 1097, 90th Cong., 2d Sess. 101, U.S. Cong. and Admin. News 1968, pp. 2112, 2190):

> "What is important is that the facts in the application on a case-by-case basis justify the period of time of the surveillance."

Here, the original wiretap order authorized wiretap surveillance beyond the first interception of the type of communication sought and until the government's objectives were achieved or for 20 days (whichever occurred earlier), without requiring either application for such authority or a statement of facts establishing probable cause to believe that communications of the type described would occur following the first such communication. The extension order permitted a flat, 10-day period of wiretapping also without requiring application or particular government statement of probable cause.

In holding that Title III wiretap legislation met the constitutional tests of *Berger* v. *New York, supra,* 388 U.S. 41, and *Katz* v. *United States,* 389 U.S. 347 (1967), the Third Circuit in *United States* v. *Cafero,* 473 F. 2d 489 (3d Cir. 1973), *cert. denied,* 417 U.S. 918 (1974), stressed the critical importance of the requirement that the judge find probable cause to justify wiretapping beyond the interception of the first communication sought (*id.,* 473 F. 2d, at 496):

> "* * * [T]he language of section 2518(1)(d) * * * requires that where automatic termination is not desired upon obtaining the described communication, *the application must specifically set forth facts establishing probable cause to believe that additional communications of the same type will be received.*" (Emphasis supplied.)

And compare, *United States* v. *Poeta,* 455 F. 2d 117, 120 (2d Cir. 1972), *cert. denied,* 406 U.S. 948 (1972), in which wiretapping beyond the interception of the first conversation of the type described was upheld by this Court on a specific finding that the application requested such authority and alleged facts in support of that request.

The failure by the government to strictly comply with Title III's provisions concerning wiretap applications must result in suppression of the wiretap evidence and evidence derived from it. Compare, *United States* v. *Giordano, supra,* 416 U.S. 505; *United States* v. *Bellosi,* 501 F. 2d 833 (D.C. Cir. 1974).

In *Giordano, supra,* Title III's provision that applications for approval of wiretapping must be authorized by the Attorney General or a specifically designated Assistant

Attorney General (18 U.S.C. §2516[1]) was construed by the Supreme Court in strict accordance with the statutory language. In rejecting the government's attempt to stretch the language of Section 2516(1) to permit the Attorney General to delegate his authorization power to any subordinate Justice Department official, the Court refused to interpret a clearly worded provision of Title III in a manner which would make it easier for an investigative agency to get authorization to wiretap.

In the case at bar, the government sought tacit permission to continue wiretapping after the initial interception of the type of communication described without following and in disregard of the explicit provisions of Section 2518(1)(d) regarding application for such permission. Section 2518(1)(d) is surely no less important than Section 2516(1) to Congress' legislative scheme to allow only limited wiretapping.

As in *Giordano, supra,* the conversations intercepted in this case were "unlawfully intercepted" and must be suppressed.

2. The Original and Renewal Wiretap Orders Unconstitutionally Permitted Blanket 20-Day and 10-Day Periods of Interception.

The July 20, 1973 order authorized wiretapping:

> "until communications are intercepted which reveal the details of the scheme which has been used by Stuart L. Steinberg and others as yet unknown, to distribute, deliver and possess with the intent to distribute and otherwise illegally deal in narcotics and dangerous

> drugs, and the identity of their confederates, their places of operation, and the nature of the conspiracy involved therein or for a period of twenty (20) days from the date of this order, whichever is earlier'' (JA 15-16).

The August 20, 1973 renewal order authorized wiretapping for a 10-day period and included no other termination provision (JA 36).

Both the original and renewal order, in effect, authorized a continuous 20-day and 10-day eavesdrop, with discretion to terminate vested solely with the executing officers.

It is submitted that neither order was sufficient to limit the surveillance in scope or duration to comport with Fourth Amendment requirements.

In both *Berger* v. *New York, supra,* 388 U.S. 41, and *Katz* v. *United States, supra,* 389 U.S. 347, the Supreme Court repeatedly emphasized the constitutional necessity for ''precise,'' ''limited,'' ''carefully circumscribed'' intrusions. Indeed, Congress shaped Title III around the constitutional standards set forth in those cases. With respect to the statutory provisions relating to the period of time for which a wiretap could be authorized and not violate Fourth Amendment principles, the legislative history states as follows (1968 U.S. Code Cong. and Admin. News, at 2192):

> ''It is intended to prevent the issuance of blank warrants, condemned in *Berger* v. *New York,* 87 S. Ct. 1873, 388 U.S. 41 (1967). It requires the time of the warrant to be carefully tailored to the showing of probable cause.''

The original warrant here permitted wiretapping for a flat 20-day period or until the government's objectives were achieved, whichever occurred earlier. While hypothetically

possible for the wiretap to have terminated before the expiration of the 20-day period, that is, upon achievement of the government's objectives, it did not, and the possibility that it would was a remote one dependent on the judgment of the monitoring agents. The executing officers, left on their own for days on end, cannot realistically be expected to determine, in a neutral, detached manner, at what point they had heard a sufficient quantity of communications to reveal "the details" of the scheme used by Steinberg and others unknown, "the identity of their confederates," "their places of operation," and the "nature of the conspiracy," so that the interception should cease.

To be sure, 18 U.S.C. §2518(5) provides that in no case may an eavesdropping order authorize an interception for a period of time "longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days." However, when the government's stated objective is as broad and imprecise as in this case, the potential for a voluntary termination of the wiretap at a date earlier than the maximum period allowed in the order is illusory.

Thus, where, as in the instant case, the government is permitted to continue surveillance following the first interception of the type of communication sought, and the statement of authorized objectives is all-encompassing so that there is no real possibility of termination prior to the latest date permitted in the orders, the eavesdropping orders amount to no more than the "blank warrants" condemned in *Berger* v. *New York*, *supra*, authorizing continuous eavesdropping "the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause." (*Id.*, 388 U.S., at 57).

The renewal order did not even provide the possibility of termination prior to the maximum 10-day period authorized in violation of the Title III provision that every order and extension thereof "shall contain a provision that the authorization to intercept * * * must terminate upon attainment of the authorized objective * * * (18 U.S.C. §2518[5]).*

The intrusions permitted here were not "precise" nor "carefully circumscribed" nor "very limited." The fact is that 30 days of eavesdropping were authorized with no limitation other than a broad, nonspecific statement of objectives incapable of providing direction to the executing officers so that they could possibly judge when they seized all that they were authorized to seize. *Cf., Stanford* v. *Texas*, 379 U.S. 476, 485 (1965), *rehrg. denied*, 380 U.S. 926 (1965); *Frank* v. *Maryland*, 359 U.S. 360 (1959); *Marron* v. *United States*, 275 U.S. 192, 196 (1927).

That the orders required interim 5-day reports to be made to the issuing judge does not amount to a constitutional substitute for imposition of specific pre-wiretap controls.

In sum, the wiretaps in this case were authorized for lengthy, continuous periods of time with great discretion given to the executing officers as to when to cease the intru-

* In *United States* v. *Bynum*, 475 F. 2d 832 (2d Cir. 1973), *vacated on other grnds.*, 417 U.S. 903 (1974), this Court held that an extension order which lacked a minimization provision "incorporates by reference the minimization language of the first order." That reasoning is inapplicable to the missing termination statement in the renewal order in this case. Even if it could be said that extension orders incorporate by reference the termination language of the first order, here the statement of objectives to be achieved as enumerated in the original order differs from the objectives detailed in the government's affidavit submitted in support of the renewal order. (Compare July 20, 1973 wiretap order, p. 4, JA 16 with affidavit of Brian J. Noone, dated August 20, 1973, p. 8, JA 52).

sion. The broad sweep of such surveillance violates fundamental Fourth Amendment law. It follows that the intercepted communications and evidence derived therefrom must be suppressed.

POINT III

THE CONDUCT CHARGED IN COUNTS 7 THROUGH 12 AND 14 DOES NOT CONSTITUTE A CRIME WITHIN THE MEANING OF SECTION 843(b) OF TITLE 21.

Counts 7 through 12 and 14 charge Steinberg and others with seven violations of 21 U.S.C. §843(b) in that the telephone was used "in committing and in causing and facilitating the commission of *the conspiracy* set forth in Count One of [the] Indictment" (emphasis added).

Section 843(b) of Title 21 provides, in pertinent part, that:

> "It shall be unlawful for any person knowingly or intentionally to use [the telephone] in committing or in causing or facilitating the commission of *any act or acts* constituting a felony under any provision of [Sections 801-966 of Title 21]." (Emphasis supplied.)

It is submitted that a conspiracy is not an "act or acts" within the scope of Section 843(b), and accordingly, the counts charging Steinberg with using the telephone in committing and in causing and facilitating the commission of *the conspiracy* charged in count one fail to charge violations of 21 U.S.C. §843(b). Steinberg's motion prior to trial to dismiss on this basis was denied.

It is fundamental to the law of conspiracy that the "gist of the 'conspiracy' offense is an *agreement.*" See, *eg.*,

Braverman v. *United States,* 317 U.S. 49 (1942); *United States* v. *Falcone,* 311 U.S. 205 (1941); *United States* v. *Cohen,* 145 F. 2d 82 (1944), *cert. denied,* 323 U.S. 799 (1945); *United States* v. *Grunewald,* 162 F. Supp. 626 (S.D.N.Y. 1958). Although there must be proof of some act in furtherance of an illegal agreement to constitute a conspiracy, that act need not be illegal. Accordingly, reference to "act or acts constituting a felony" in Section 843(b) cannot refer to an overt act in the context of a conspiracy charge.

That the language "act or acts" in Section 843(b) was not intended by Congress to include a conspiracy within its embrace is graphically demonstrated by that section's predecessor statute.

In 1970, Section 843(b) replaced 18 U.S.C. §1403(a) in the federal code as the provision prohibiting the use of communication facilities in connection with narcotic offenses.

18 U.S.C. §1403(a) punished the use of any communication facility "in committing or in causing or facilitating the commission of, *or in attempting to commit,* any act or acts constituting an offense *or a conspiracy to commit an offense* * * *." (Emphasis supplied.)

The new statute, 21 U.S.C. §843(b), omits both the attempt and conspiracy provisions of §1403(a) in proscribing only the use of a communication facility in committing or in causing or facilitating the commission of "*any act or acts.*" Certainly if the Congress intended to include a conspiracy within the embrace of Section 843(b), it would have carried over those words into the new statute. The omission of

those words convincingly shows that Congress did not intend Section 843(b) to punish the use of a communication facility to commit a conspiracy.

A further insight into legislative intent on the meaning of Section 843(b)'s words "act or acts constituting a felony" can be gleaned from the language of the other penal provisions of Title 21.

Sections 841, 842, and 843 explicitly enumerate all of *the acts* punishable as "*prohibited acts*" and "*unlawful acts*" under Title 21. Section 841(a) proscribes acts of manufacturing, distributing, dispensing, possessing, and creating controlled or counterfeit substances. Section 842(a) proscribes acts of distributing, dispensing, and manufacturing controlled substances; removing, altering, or obliterating a symbol or label; refusing or failing to make, keep, or furnish certain records; refusing inspection, and removing, breaking, injuring, or defacing seals. Section 843(a) prohibits acts of distributing controlled substances; acquiring possession of a controlled substance by fraud, etc.; furnishing false information, and mislabeling drugs.

The general proscription in Section 843(b) punishing the use of communication facilities in committing or in causing or facilitating the commission "of any act or acts" constituting a felony under Sections 801-966 of Title 21 must reasonably be construed to refer to the unlawful acts enumerated in Title 21 as "unlawful acts" or "prohibited acts."

To be sure, 21 U.S.C. §846 prohibits a conspiracy to commit any offense enumerated in Sections 841, 842, and

843. However, unlike the prohibitions of Sections 841, 842, and 843, which are all entitled "Prohibited Acts—Unlawful Act," the conspiracy provision is entitled "Attempt and Conspiracy."

Since, as a matter of law, the use of a communication facility to commit or cause or facilitate the commission of a conspiracy does not constitute a crime under Section 843(b) of Title 21, Steinberg's conviction on Counts 7 through 12 and 14 must be reversed and those counts of the indictment dismissed.

POINT IV

STEINBERG RELIES UPON THE FOREGOING POINTS, AND THOSE OF OTHER APPELLANTS IN THIS CASE, INSOFAR AS APPLICABLE.

Conclusion

The judgment of conviction should be reversed and the indictment dismissed.

Respectfully submitted,

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May 19, 1975

Service of 2 copies of the
within Brief is hereby
admitted this 19th day of
May 1975

Signed _____

Attorney for Appellee.

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